

REPRESENTATIVE FOR PETITIONER:

Robert T. Nicholson

REPRESENTATIVE FOR RESPONDENT:

Brian Cusimano, Attorney

**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Joseph P. Nicholson	)	Petition No.:	27-002-14-1-5-01628-16
	)		
Petitioner,	)	Parcel No.	27-07-07-402-080.000-002
	)		
v.	)	County:	Grant
	)		
Grant County Assessor,	)	Township:	Center
	)		
Respondent.	)	Assessment Year:	2013

**Issued: January 17, 2018**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (“Board”) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**ISSUE**

1. Petitioner challenges the Grant County Auditor’s (“Auditor”) removal of Petitioner’s homestead deduction for 2013.<sup>1</sup> The Board, however, disagrees and finds for Respondent for the following reasons.

<sup>1</sup> The parties use the terms “homestead deduction” and “homestead exemption” interchangeably. The Board infers they are referring to the standard deduction for homesteads provided for under Ind. Code § 6-1.1-12-37, and will use the term “homestead deduction” hereinafter.

## PROCEDURAL HISTORY

2. On June 2, 2014, the Auditor sent a letter informing Petitioner that the Auditor's office was conducting an investigation to determine Petitioner's principal place of residence. Petitioner did not subsequently provide the Auditor with evidence to convince the Auditor that the subject property was Petitioner's principal place of residence. The Auditor then sent notice to Petitioner on September 23, 2014, informing him that an ineligible homestead deduction had been claimed for 2013 and that certain taxes and penalties were due. Petitioner did not appeal the Auditor's decision at the local level and eventually sought review by the Board in a letter dated July 31, 2016. On August 25, 2016, the Board sent Petitioner a Notice of Defect requesting Petitioner complete Form 131 ("Petition for Review of Assessment Before the Indiana Board of Tax Review"). On October 31, 2016, Petitioner submitted a Form 131, albeit with various inaccuracies. For example, the taxpayer in this case is Joseph Nicholson and the subject property is located at 202 West 20th Street in Marion. However, the Form 131 listed Robert Nicholson as Petitioner and 910 Euclid Avenue in Marion as the subject property. The Form 131 also listed both 2013 and 2014 as the years under appeal. Nonetheless, the Board accepted the Form 131 and set the matter for hearing.<sup>2</sup> On September 25, 2017, Robert Nicholson sent a letter to the Board requesting the issuance of a subpoena duces tecum. Specifically, Robert Nicholson requested that Department of Local Government Finance ("DLGF") Deputy General Counsel David Marusarz appear at the hearing accompanied by certain documents. On October 3, 2017, the Board responded to Robert Nicholson's request and asked him to explain how he is qualified to represent Joseph Nicholson before issuing the subpoena. On October 6, 2017, Robert Nicholson sent another letter to the Board again requesting the issuance of the subpoena duces tecum and attaching a Limited Power of Attorney listing him as the designee. On October 12, 2017, the Board responded to Robert Nicholson's letter informing him that a power of attorney did not grant him the

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<sup>2</sup> At the Board hearing, Robert Nicholson clarified that Petitioner is Joseph P. Nicholson, that the property under appeal is 202 West 20th Street in Marion, and that the year under appeal is 2013. *See Board Exhibit A.*

right to represent Joseph Nicholson in an appeal before the Board, that the Indiana Supreme Court prohibits the unauthorized practice of law, and that while he may appear as a witness on Joseph Nicholson's behalf, he may not present the case in Joseph Nicholson's absence except in accordance with the Board's rules. Nonetheless, the Board signed the subpoena duces tecum and returned it to Robert Nicholson instructing him that it was his responsibility to have the subpoena properly served.

3. On October 19, 2017, the Board's designated administrative law judge ("ALJ") Dalene McMillen, attorney Brian Cusimano, and Robert Nicholson, among others, congregated at the designated time and place for the hearing. Prior to the hearing, Robert Nicholson presented the ALJ with a note that stated "I, Joseph P. Nicholson, hereby authorize my employee, Robert T. Nicholson, to represent me in all matters concerning the property he manages for me, namely 202 West 20th Street, Marion, IN 46953, in accordance with 52 IAC 2-2-4." The note appears to have been signed by Joseph P. Nicholson and was dated June 1, 2016. Uncertain as to how to proceed, the ALJ contacted the Board telephonically and was instructed to go forward with the hearing as scheduled, which she did. Neither the ALJ nor the Board inspected the property.

4. The following people were sworn and testified:

Robert T. Nicholson, son and employee of Petitioner,  
Roger A. Bainbridge, Grant County Auditor,  
April Legare, Grant County Deputy Auditor.<sup>3</sup>

5. Petitioner offered the following exhibit:

Petitioner Exhibit 1 – DLGF presentation "The Tricks and Treats of Deductions" prepared by Mike Duffy, Staff Attorney, dated October 23, 2013.

6. Respondent offered the following exhibits:

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<sup>3</sup> Gary Landrum, Grant County Assessor, was sworn but did not testify. Caitlin Schwartz, Grant County Deputy Auditor, was present to observe the hearing.

- Respondent Exhibit 1 – Claim for Homestead Property Tax Standard / Supplemental Deduction – Form HC-10, dated June 10, 2009,
- Respondent Exhibit 2 – Letter from Roger Bainbridge, Grant County Auditor to Joseph P. Nicholson at 202 West 20th Street in Marion, dated June 2, 2014,
- Respondent Exhibit 3 – Letter from Roger Bainbridge, Grant County Auditor to Joseph P. Nicholson at 908 West Euclid Avenue in Marion, dated June 2, 2014,
- Respondent Exhibit 7 – Notice of Taxes and Penalties Due To Auditor of Grant County, Indiana, dated September 23, 2014.<sup>4</sup>

7. The following additional items are part of the record:

- Board Exhibit A – Form 131 petition and attachments,
- Board Exhibit B – Hearing notice,
- Board Exhibit C – Hearing sign-in sheet.

#### **OBJECTIONS**

8. Mr. Cusimano objected to Robert Nicholson’s testimony regarding Joseph Nicholson’s intent to return to the subject property as hearsay. In response, Robert Nicholson stated that Petitioner had indicated such intent in a letter that Petitioner had sent to the Auditor.
9. “Hearsay” is a statement, other than one made while testifying, that is offered to prove the truth of a matter asserted. Such a statement can be either oral or written. (Ind. R. Evid. 801(c)). The Board’s procedural rules specifically address hearsay evidence:

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence.

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<sup>4</sup> Respondent did not submit exhibits 4-6.

52 IAC 3-1-5(b). The word “may” is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but it is not required to allow it.

10. While Robert Nicholson’s testimony is hearsay and he failed to indicate to what letter he was referring, the testimony is admitted nonetheless. However, because Respondent objected and Petitioner failed to establish that any recognized exception applies, the testimony cannot serve as the sole basis for the Board’s decision.
11. Robert Nicholson objected to Respondent Exhibit 7 because the correspondence contains no mailing address. He contends that the Auditor failed to show the notice was actually mailed or that Petitioner actually received it.
12. During the hearing, the Auditor testified that the notice was an accurate copy of what was mailed to Petitioner. Furthermore, Grant County Deputy Auditor April Legare testified that she personally mailed the notice to 202 West 20th Street in Marion and 910 West Euclid Avenue in Marion. Thus, Petitioner’s objection is overruled.

#### **PETITIONER’S CONTENTIONS**

13. Petitioner was initially granted a homestead deduction in 2009 for the property at 202 West 20th Street. Petitioner received a letter from the Auditor dated June 2, 2014, requesting certain documentation proving that 202 West 20th Street was still Petitioner’s principal place of residence. *Robert Nicholson testimony; Board Ex. A.*
14. On June 19, 2014, Petitioner responded with a letter in which he acknowledged that the documentation requested by the Auditor would show a postal address different from that of the subject property and he stated that his principal place of residence “is the subject property, as it has been since 1952.” In the letter, Petitioner also referenced a DLGF presentation that he claims provides guidance with regard to one’s principal place of residence. Petitioner also stated that he “recently decided to rent out the subject property

and it may not be eligible for the homestead deduction in the future.” *Robert Nicholson testimony; Board Ex. A.*

15. Robert Nicholson argues that the October 23, 2013, DLGF presentation entitled “The Tricks and Treats of Deductions” prepared by DLGF staff attorney Mike Duffy clarifies the term “principal place of residence.” The presentation states

A person can continue to receive the homestead deduction even during an absence from their principal place of residence so long as the person has the intention of returning to the property and the property is maintained as his or her principal place of residence (in other words, not rented out) during the absence. This is true of people on business, who are deployed, or even who are incarcerated.

Robert Nicholson argues that since the subject property was not going to be rented, nor was it in fact rented, until after June of 2014, it should have qualified as Petitioner’s principal place of residence for 2013. *Robert Nicholson testimony; Pet’r Ex. 1.*

16. On June 30, 2014, Petitioner received another letter from the Auditor in which the Auditor discussed the term “residence” and indicated that the utility bill Petitioner had provided was insufficient to verify that the subject property was being maintained for Petitioner’s return. In addition, the Auditor stated that Petitioner could “have the [h]omestead deduction as long as you can ‘provide evidence’ of the sort which I have requested. If you can’t do that by July 2, then you will be getting a bill from me.” *Robert Nicholson testimony; Board Ex. A.*

17. Robert Nicholson states that the Auditor claims to have mailed to Petitioner a “Notice of Taxes and Penalties Due To Auditor of Grant County, Indiana” on September 23, 2014. He claims Petitioner never received any such notice and notes that there is no address on the notice showing where it was mailed. On May 20, 2015, Petitioner sent a letter to the Auditor regarding the removal of the homestead deduction and informing the Auditor of his failure to provide a written determination of his action and of his failure to inform Petitioner of his right to appeal. Petitioner claims he became aware of the removal of the

homestead deduction via the internet and by noticing that additional taxes had been applied to the subject property in 2014. Because the Auditor failed to respond to this letter, Petitioner filed for review with the Indiana Board of Tax Review in a letter dated July 31, 2016. As discussed previously, the Board sent a Notice of Defect requesting that Petitioner complete a Form 131 petition which Petitioner returned on October 3, 2016.

*Robert Nicholson testimony; Resp't Ex. 7; Board Ex. A.*

18. In response to questioning at the hearing, Robert Nicholson stated that Petitioner lives in an apartment in Williamsburg Manor in Marion. *Robert Nicholson testimony.*

### **RESPONDENT'S CONTENTIONS**

19. Respondent first contends that Robert Nicholson is not authorized to represent Petitioner in this appeal. He simply provided a letter at the hearing stating he is an employee of Petitioner. He could not substantiate the claim with any sort of documentary evidence such as a Form W-2 or pay stub. *Cusimano argument.*
20. Respondent next argues Petitioner was required to exhaust his administrative remedies at the local level before filing an appeal with the Board (*citing Ispat Inland Inc. v. State Board of Tax Commissioners*, 784 N.E.2d 477 (Tax Ct. 2003)). The Auditor claims he did not become aware of Petitioner's intention to appeal until the Form 131 was filed with the Board in 2016. He further claims Petitioner never filed a Form 133 ("Appeal for Correction of an Error") or a Form 130 ("Taxpayer's Notice to Initiate an Appeal") with the county and that the PTABOA had no opportunity to hear the case. *Bainbridge testimony; Cusimano argument; Board Ex. A.*
21. Finally, Respondent contends that the subject property was not Petitioner's principal place of residence for the year under appeal. The Auditor claims that through certain Bureau of Motor Vehicle excise records, the county discovered that Petitioner had registered a vehicle and paid excise tax while at an address other than 202 West 20th Street. Based on that information, the Auditor mailed letters requesting proof of

Petitioner's principal place of residence to 202 West 20th Street and to 908 West Euclid Avenue, which was the address listed on the Bureau of Motor Vehicle excise records. The Auditor contends Petitioner's response to those letters did not contain any evidence that lead him to believe Petitioner was residing at 202 West 20th Street. Consequently, he mailed a document entitled "Notice of Taxes and Penalties Due To Auditor of Grant County, Indiana" on September 23, 2014. Ms. Legare testified that she personally mailed that notice to Petitioner at both 202 West 20th Street and 910 West Euclid Avenue on September 23, 2014. *Bainbridge & Legare testimony; Resp't Exs. 2, 3, and 7.*

### **Analysis**

22. Respondent claims he should prevail because Robert Nicholson was not authorized to represent Petitioner in this matter, because Petitioner did not exhaust his administrative remedies, and because Petitioner did not prove that the subject property was his principal place of residence.
23. Only an authorized representative may represent a party before the Board. An authorized party, among other things, means a permanent full time employee of the owner of a property. 52 IAC 2-2-4. In this case, Robert Nicholson claims to have been an employee of Petitioner. However, as Respondent points out, Robert Nicholson did not substantiate that claim with any sort of documentary evidence such as a Form W-2 or a pay stub. On the other hand, the Board informed Robert Nicholson it would sign the subpoena duces tecum he requested once he explained how he was qualified to represent Petitioner. After further correspondence between Robert Nicholson and the Board, the Board ultimately signed the subpoena duces tecum. Robert Nicholson also presented a note at the hearing signed by Petitioner indicating Robert Nicholson was authorized to represent Petitioner. The ALJ consulted the Board telephonically with regard to this note prior to the hearing and the Board instructed the ALJ to proceed as scheduled.
24. The Board presented Petitioner with an opportunity at the hearing to prove that Robert Nicholson was authorized to represent Petitioner. The Board finds the evidence is

insufficient and Robert Nicholson was not qualified to represent Petitioner in this matter because his claims of being a full-time employee are not credible. Moreover, Mr. Nicholson's actions in this case, as explained below, show why the Board has rules to ensure competent representation.

25. Respondent next claims Petitioner's claim should be dismissed because he did not initially file an appeal at the county level. The Board agrees. Although taxpayers have the right to challenge an assessment, they must comply with the statutory requirements for doing so. *See Williams Industries v. State Bd. of Tax Comm'rs*, 648 N.E.2d 713, 718 (Ind. Tax Ct. 1995).
26. The Board finds Respondent made a prima facie case showing that Petitioner did not appeal his 2013 deduction at the local level, a statutory prerequisite for appealing to the Board. The statute does not offer Petitioner the option of bypassing the county level and appealing directly to the Board.
27. Regardless of whether Petitioner received the notice, Petitioner must follow the statute to challenge the removal of the deduction and the Board cannot grant the relief he seeks until he has properly appealed the matter.
28. Although this result may seem harsh, its severity is mitigated by the fact that the Board would have declined to offer Petitioner any relief even if it were to address the appeal on its merits. To explain why the Board turns to those merits,
29. Ind. Code § 6-1.1-12-37 provides a deduction in specified amounts for homesteads, which it defines as follows:

- (a) The following definitions apply throughout this section:
  - (1) "Dwelling" means any of the following:
    - (A) Residential real property improvements that an individual uses as the individual's residence, including a house or garage.

...

(2) “Homestead” means an *individual’s principal place of residence*:

(A) That is located in Indiana:

(B) that: (i) the individual owns; (ii) the individual is buying under contract; recorded in the county recorder’s office, that provides that the individual is to pay the property taxes on the residence . . . ; and

(C) that consists of a dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds that dwelling.

...

(j) A county auditor may require an individual to provide evidence proving that the individual’s residence is the individual’s principal place of residence . . . . The county auditor may limit the evidence that an individual’s is required to submit to a state income tax return, a valid driver’s license, or a valid voter registration card showing that the residence for which the deduction is claimed is the individual’s principal place of residence.

Ind. Code §6-1.1-12-37 (emphasis added).

30. Although Ind. Code §6-1.1-12-37 does not define “principal place of residence,” the DLGF defines that term as “an individual’s true, fixed, permanent home to which the individual has the intention of returning after an absence.” 50 IAC 24-2-5.
31. Furthermore, in *Kellam v. Fountain County Assessor*, 999 N.E.2d 120, 124 (Ind. Tax Ct. 2013), the Indiana Tax Court stated that the legal standard for determining an individual’s principal place of residence depends on the intention to return to the property after an absence, not continuous physical presence. As further evidence that the subject property was the petitioner’s principal place of address in that case, the court noted the petitioner’s use of the subject property’s address as his mailing address, and as the address on his driver’s license, bank statements, voter registration, and tax returns.
32. The Board therefore must decide how the DLGF’s and Indiana Tax Court’s definitions of a taxpayer’s principal place of residence applies to the facts presented in this appeal.

Petitioner applied for a homestead deduction in 2009. In a letter to the Auditor dated June 19, 2014, Petitioner stipulated that the documents the Auditor had requested (copies of Petitioner's driver's license or state ID card, valid insurance card, valid Indiana vehicle registration, and Indiana income tax returns and accompanying forms) show a postal address different than that of the subject property. Furthermore, Robert Nicholson testified that Petitioner moved to an apartment in Williamsburg Manor in Marion, but he failed to provide testimony or specific evidence regarding when Petitioner moved. Robert Nicholson offered no credible evidence to show that Petitioner treated the subject property as his fixed, permanent home to which he intended to return. Furthermore, Petitioner did not personally appear at the hearing to offer testimony or other evidence indicating such. To the contrary, Petitioner at some point moved out of the subject property and apparently changed his driver's license and vehicle registration to reflect a mailing address different from that of the subject property. Consequently, Petitioner has failed to produce any of the items indicated in *Kellam* to establish that he used the subject property as his principal place of residence in 2013 and failed to provide probative evidence of his intention to return there.

#### **SUMMARY OF FINAL DETERMINATION**

33. The Board finds Robert Nicholson was not authorized to represent Petitioner in this appeal, and Petitioner did not properly appeal the matter pursuant to statute. Furthermore, even if Petitioner had exhausted his administrative remedies, he failed to establish that the property was his principal place of residence in 2013 or provide probative evidence of his intention to return there.

The Final Determination of the above captioned matter is issued by the Board on the date written above.

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

**- APPEAL RIGHTS -**

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.